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The Second Amendment is History: Ninth Circuit Takes Originalist Approach in Finding No Right to Public Carry in Young v. Hawaii

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Note

THE SECOND AMENDMENT IS HISTORY: NINTH CIRCUIT TAKES ORIGINALIST APPROACH IN FINDING NO RIGHT TO PUBLIC CARRY IN *YOUNG v. HAWAII*

Scott Kingsbury*

"Does medieval and early modern English history really matter? In my role as a federal appellate court judge, I can safely say that, for me, the answer is yes, because our Supreme Court has said so."[1]

I. Second Amendment Jurisprudence: 200 Years of Quiescence

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[2] For more than 200 years following the adoption of the Second Amendment, the U.S. Supreme Court did not address any questions regarding the constitutionality of firearms regulations.[3] Then, in the 2008 case of *District of Columbia v. Heller*,[4] the U.S. Supreme Court declared the Second Amendment guarantees an individual right to bear arms.[5] Today, any discussion of the Second Amendment must begin with *Heller*.[6]

In *Heller*, the Supreme Court decided that the Second Amendment guarantees an individual right to possess firearms for self-defense inside the home.[7] The *Heller* Court did not establish a clear test for lower courts

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1. Diarmuid F. O'Scannlain, *Glorious Revolution to American Revolution: The English Origin of the Right to Keep and Bear Arms*, 95 Notre Dame L. Rev. 397, 399 (2019). Judge Diarmuid F. O'Scannlain of the United States Court of Appeals for the Ninth Circuit delivered this quote during a lecture as part of the University of Notre Dame's London Law at 50 Speaker Series. *See id.* at 397.

2. U.S. Const. amend. II.

3. *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) ("For most of our history the question [of the constitutionality of firearms regulations] did not present itself.").

4. 554 U.S. 570 (2008).

5. *Id.* at 635 (holding that the Second Amendment guarantees an individual right to bear arms and that District of Columbia laws prohibiting handgun possession and keeping operable firearms in the home violated this right).

6. Jonathan E. Taylor, *The Surprisingly Strong Originalist Case for Public Carry Laws*, 43 Harv. J.L. & Pub. Pol'y 347, 347 (2020) (remarking that a discussion of public carry laws must start with a consideration of *Heller*).

7. *Heller*, 554 U.S. at 635 ("[W]e hold that the District's ban on handgun possession in the home violates the Second Amendment . . . .").

to follow when considering firearm restrictions, stating the restriction at issue in *Heller* would be unconstitutional under "any of the standards of scrutiny that we have applied to enumerated constitutional rights."[8] However, the Court also said the right to bear arms protected by the Second Amendment "is not unlimited."[9] Two years after *Heller*, the Supreme Court decided the Second Amendment is applicable to the states through the Fourteenth Amendment's Due Process Clause.[10]

In response to gun violence, many states have implemented regulatory schemes that require individuals to show "proper cause" to carry firearms in public.[11] Under these schemes, individuals must demonstrate a "special need" to protect themselves to obtain a license to carry firearms in public.[12] Some judges and commentators believe proper cause laws restrict the Second Amendment rights of individuals unable to demonstrate a special need to protect themselves.[13] "[W]hether the Second Amendment guarantees individuals the right to carry arms openly in public" is, not surprisingly, "a question that has divided the circuits."[14] The Ninth Circuit correctly concluded that proper cause laws do not violate the Second Amendment in *Young v. Hawaii*;[15] however, the *Young* court's decision that these restrictions regulate conduct outside of the scope of the Second Amendment is inconsistent with all other circuits that have addressed the issue and with the Supreme Court's decision in *Heller*.[16]

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8. *See id.* at 628–29 ("The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning [firearms] from the home . . . would fail constitutional muster." (citation omitted)).

9. *Id.* at 626 (opining that the Second Amendment right is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose . . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . .").

10. McDonald v. City of Chicago, 561 U.S. 742, 749–50 (2010) ("[W]e hold that the Second Amendment right is fully applicable to the States.").

11. *See* Chelsea Tisoky, Comment, *The Constitutionality of "Special Need" Laws*, 5 U. PA. J.L. & PUB. AFF. 533, 535–36 (2020) (arguing "special need" public carry laws should be subject to strict scrutiny, but that they are narrowly tailored to further a compelling government interest, so they withstand strict scrutiny).

12. *Id.* at 535 ("[U]nder [proper cause regulatory schemes,] individuals may not carry firearms in public unless they have a valid statutory reason."). These regulations are sometimes also referred to as "justifiable need," "good cause," "good reason to fear injury," and "good and substantial reason" laws. *Id.*

13. *See, e.g.*, Young v. Hawaii, 992 F.3d 765, 784 (9th Cir. 2021) *vacated* 142 S. Ct. 2895 (2022).

14. *Id.* ("[O]ur first task is to determine whether the right to carry a firearm openly in public is protected by the Second Amendment.").

15. 992 F.3d 765 (9th Cir. 2021), *vacated* 142 S. Ct. 2895 (2022).

16. *See id.* at 784 ("Each of these circuits . . . assumed that there was some Second Amendment right to carry firearms in public and applied intermediate scrutiny to the regulations at issue."). The *Young* court, on the other hand, was "persuaded that government regulations on open carry . . . 'fall outside of the

The Ninth Circuit, like most circuits, follows a two-step framework for reviewing Second Amendment challenges.[17] The court first asks whether a challenged law burdens a right protected by the Second Amendment.[18] If it does, the court then applies an appropriate level of means-end scrutiny (i.e., rational basis, intermediate scrutiny, or strict scrutiny) to the challenged law.[19] In *Young*, the Ninth Circuit became the first circuit to decide that proper cause laws do not burden a right protected by the Second Amendment, upholding the law in step one and thus never reaching the means-end analysis of step two.[20]

This Note analyzes the Ninth Circuit's decision that proper cause laws do not burden a right protected by the Second Amendment based on the Anglo-American history of public carry laws. Ultimately, this Note argues that, although the Ninth Circuit correctly concluded that proper cause laws do not violate the Second Amendment, it should have decided the issue based on means-end analysis—consistent with all other circuits that have addressed the issue—rather than deciding the case based on history and tradition.[21] Part II summarizes the circuit split that developed over the constitutionality of proper cause laws following the Supreme Court's decision in *Heller*. Part III provides the facts and procedural history of *Young*. Part IV summarizes the Ninth Circuit's canvas of more than 700 years of legal history and discusses the en banc court's decision that this history disproves any individual Second Amendment right to bear arms in public for self-defense. Part V critiques the Ninth Circuit's departure from all other circuit courts in its use of history instead of means-end analysis to decide the constitutionality of proper cause laws. Part VI discusses the

Second Amendment's scope,' and thus 'may be upheld without further analysis.'" *Id.* at 813 (quoting Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016)).

17. *See Young*, 992 F.3d at 783 (applying the two-step framework).

18. *See id.* (explaining that the Supreme Court has frequently relied on a historical understanding of the Second Amendment when determining whether a law burdens a Second Amendment right).

19. *See id.* at 784 (describing the second step of the two-step framework).

20. *See id.* at 784–85, 823 (observing that, although other circuits assumed proper cause laws restricted a Second Amendment right to avoid extensive historical analysis in favor of means-end analysis, "[w]e do not think we can avoid the historical record").

21. *See* Russell W. Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A. L. REV. 449, 450 (1988) (explaining that courts performing means-end analysis (or means-end scrutiny) look to determine whether an appropriate relationship exists between a government action and the government interest it purportedly seeks to further). To pass rational basis review, the least intense form of means-end analysis, government actions require only some rational relationship to a legitimate government interest, regardless of the availability of less restrictive alternatives. *See id.* at 451. To pass strict scrutiny, the most intense form of means-end analysis, government actions must be narrowly tailored—i.e., the least restrictive means possible—to further a compelling government interest. *See id.* at 453. Intermediate scrutiny, as the name suggests, is a standard between rational basis and strict scrutiny; it requires that a government action be "substantially related to an important government objective." *See* Gould v. Morgan, 907 F.3d 659, 672 (1st Cir. 2018) (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)).

impact of *Young* and the Supreme Court's similarly history-based decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*.[22]

II. CIRCUITS SPLIT OVER HOW TO SCRUTINIZE PROPER CAUSE LAWS

The First, Second, Third, Fourth, and Ninth Circuits upheld proper cause licensing schemes against Second Amendment challenges, while the Seventh and D.C. Circuits found that such schemes violate the Second Amendment.[23] However, all but the Ninth Circuit either found or assumed that there is a Second Amendment right to open carry.[24] The Ninth Circuit concluded that proper cause restrictions on the open carry of firearms "reflect longstanding prohibitions and . . . the conduct they regulate is therefore outside the historical scope of the Second Amendment."[25]

A. *Circuits Holding Proper Cause Laws Violate the Second Amendment*

The Seventh and D.C. Circuits found proper cause laws violated the Second Amendment by expanding the "core" of the Second Amendment from what *Heller* defined as a right to possess firearms for self-defense inside the home to a right to possess firearms for self-defense in public.[26] In

22. 142 S. Ct. 2111 (2022).

23. *See Young*, 992 F.3d at 784 (observing these courts "avoided extensive historical analysis").

24. *See id.* (stating that the First, Second, Third, and Fourth Circuits assumed there is a Second Amendment right to open carry, but that proper cause laws withstand intermediate scrutiny). A law withstands intermediate scrutiny if it is "substantially related to the achievement of an important governmental interest." Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022). The Seventh and D.C. Circuits found that there is a Second Amendment right to carry arms in public and that the proper cause laws at issue were total bans of that right, making them unconstitutional regardless of any means-end analysis. *See* Moore v. Madigan, 702 F.3d 933, 941 (7th Cir. 2012), *reh'g denied*; Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017).

25. *Young*, 992 F.3d at 772, 783 (applying the two-step framework). Most circuits have adopted a two-step framework for reviewing Second Amendment challenges. *Id.* Under the two-step framework, courts first analyze whether the challenged law affects conduct protected by the Second Amendment based on the "historical understanding of the scope of the right." *Id.* (quoting Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016)). If a court determines in the first step that the challenged law does not burden conduct protected by the Second Amendment, then the law passes constitutional muster. *Id.* If the law does burden conduct protected by the Second Amendment, then the court proceeds to the second step: determining an appropriate level of means-end scrutiny (e.g., rational basis, intermediate scrutiny, or strict scrutiny) and applying it to the challenged law. *See id.* at 784. Because the *Young* court determined the Hawaii law did not burden conduct protected by the Second Amendment based on the court's historical analysis, it did not proceed to the second step and no level of means-end scrutiny was necessary. *See id.* at 823.

26. *See Moore*, 702 F.3d at 942 (explaining that the extent of the Second Amendment right to possess firearms for self-defense "has been opened to judicial exploration by *Heller* and *McDonald*"); *Wrenn* 864 F.3d at 657 (reasoning that just

Moore v. Madigan,[27] the Seventh Circuit decided that an Illinois law prohibiting individuals from carrying a gun "ready to use" in places other than the individual's own property, home, place of business, or on property whose owner has permitted individuals to be there with a ready-to-use gun violated the Second Amendment.[28] In that case, the Seventh Circuit found the Supreme Court's decision in *Heller* controlling.[29] Like the Supreme Court in *Heller*, the *Moore* court's analysis was "not based on degrees of scrutiny."[30] The *Moore* court was "disinclined to engage in another round of historical analysis to determine whether eighteenth-century America understood the Second Amendment to include a right to bear guns outside the home."[31] Instead, the court decided that self-defense is "as important outside the home as inside," and because the Supreme Court decided the Second Amendment confers an individual right to bear arms for self-defense in *Heller*, the Illinois law infringed upon the Second Amendment.[32] Moreover, and seemingly inconsistent with its own claim that its decision was not based on degrees of scrutiny, the *Moore* court held that:

> Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden. The Supreme Court's interpretation of the Second Amendment therefore compels us to reverse the [lower courts].[33]

Similarly, the D.C. Circuit decided that a D.C. regulatory scheme requiring individuals seeking a handgun license to show "'good reason to fear injury to [their] person or property' or 'any other proper reason for

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because the Supreme Court in *Heller* focused on the need for self-defense in the home does not mean the right is limited to the home).

27. 702 F.3d 933 (7th Cir. 2012), *reh'g denied*, 708 F.3d 901.

28. *Id.* at 934, 942 ("The Supreme Court's interpretation of the Second Amendment . . . compels us to reverse . . . and remand . . . for the entry of declarations of unconstitutionality and permanent injunctions.").

29. *See id.* at 942 (finding that the Supreme Court's decision that the Second Amendment confers a right to bear arms for self-defense inside the home also established a right to bear arms for self-defense outside the home because bearing arms for self-defense "is as important outside the home as inside").

30. *Id.* at 941 ("[O]ur analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states.").

31. *Id.* at 942 (deciding the Supreme Court's analysis in *Heller* was sufficient to establish that the history of the Second Amendment confers a right to bear arms for self-defense outside the home).

32. *Id.* ("The theoretical and empirical evidence (which overall is inconclusive) is consistent with concluding that a right to carry firearms in public may promote self-defense.").

33. *Id.* (conflicting with its earlier statement that the court would not engage in degrees of scrutiny analysis).

carrying a pistol'" violated the Second Amendment.[34] The D.C. Circuit held that "the [Second] Amendment's core at a minimum shields the typically situated citizen's ability to carry common arms generally," and that because D.C.'s good-reason law "is necessarily a total ban on exercises of that constitutional right for most D.C. residents," it violates the Second Amendment based on *Heller*.[35] The Second Amendment "must enable the typical citizen to carry a gun," which necessarily conflicts with good-reason laws.[36]

B. *Circuits Holding Proper Cause Laws Do Not Violate the Second Amendment*

The First, Second, Third, and Fourth Circuits have upheld proper cause laws, eschewing historical analysis by presuming the laws burdened a right protected by the Second Amendment in order to decide the cases based on means-end analysis.[37] The Second Circuit decided that a New York law requiring individuals to show "proper cause" to obtain a handgun license does not violate the Second Amendment.[38] In *Kachalsky v. County of Westchester*,[39] the Second Circuit reasoned that "[b]ecause our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public . . . intermediate scrutiny is appropriate."[40] Considering whether New York's proper cause regulatory scheme withstood intermediate scrutiny, the *Kachalsky* court first determined the governmental interests that the law sought to further were public safety and crime prevention, which all parties agreed were "substantial, indeed compelling, governmental interests."[41] Next, the court decided the regulations on handgun possession were substantially related to those interests.[42] Thus,

34. Wrenn v. District of Columbia, 864 F.3d 650, 655 (alteration in original) (quoting D.C. Code § 22-4506(a)-(b) (2001)) ("The Code also limits what the police chief may count as satisfying these two criteria . . . ."), *reh'g denied*.

35. *Id.* at 667 (holding that the right of responsible citizens to bear arms for self-defense outside the home is a core Second Amendment right).

36. *See id.* at 668 (explaining that the court's decision "does little more than trace the boundaries laid in 1791 and flagged in *Heller*[ ]," and opining that good-reason laws "seem almost uniquely designed to defy" the Second Amendment right of the typical citizen to carry a gun).

37. Young v. Hawaii, 992 F.3d 765, 784 (9th Cir. 2021) (observing that these courts "avoided extensive historical analysis" by assuming proper cause laws burden a Second Amendment right and upholding them based on means-end analyses), *vacated* 142 S. Ct. 2895 (2022).

38. Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 84 (2d Cir. 2012) (holding the proper cause requirement would survive intermediate scrutiny if it implicated the Second Amendment), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

39. 701 F.3d 81 (2d Cir. 2012), *abrogated by Bruen*, 142 S. Ct. 2111.

40. *Id.* at 96 (explaining that a law withstands intermediate scrutiny if it is "substantially related to the achievement of an important governmental interest").

41. *Id.* at 97.

42. *Id.* at 98 ("Restricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose is substantially related to New York's interests in public safety and crime prevention.").

the law withstood intermediate scrutiny.[43] The *Kachalsky* court decided New York's proper cause law was constitutional by proceeding to the means-end analysis step of the two-step framework.[44] However, the court briefly mentioned the history of the Second Amendment and firearm regulations in dicta and implied that proper cause laws fall outside the scope of the Second Amendment, finding these laws "entirely consistent with the right to bear arms."[45]

Similarly, the Fourth Circuit decided that a Maryland law requiring individuals to have "good and substantial reason" to carry a handgun in public did not violate the Second Amendment.[46] In *Woollard v. Gallagher*,[47] the court assumed without deciding that the law implicated Second Amendment protections and applied intermediate scrutiny.[48] The law passed intermediate scrutiny because the *Woollard* court found that "there is a reasonable fit between the good-and-substantial-reason requirement and Maryland's objectives of protecting public safety and preventing crime."[49]

Further, the Third Circuit decided in *Drake v. Filko*[50] that a New Jersey law requiring "justifiable need" to carry a handgun in public did not violate the Second Amendment.[51] Despite the court's belief to the contrary, it assumed New Jersey's "justifiable need" requirement burdened conduct

43. *Id.* (reiterating that the law "need only be *substantially related* to the state's important public safety interest" and stating that "[a] perfect fit . . . is not required").

44. *Id.* at 98–99.

45. *Id.* at 100 ("In light of the state's considerable authority—enshrined within the Second Amendment—to regulate firearm possession in public, requiring a showing that there is an objective threat to a person's safety—a 'special need for self-protection'—before granting a carry license is entirely consistent with the right to bear arms." (quoting N.Y. Penal Law § 400.00(2)(f) (McKinney 2022), *invalidated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022))).

46. Woollard v. Gallagher, 712 F.3d 865, 868 (4th Cir. 2013) (disagreeing with the district court's "trailblazing pronouncement that the Second Amendment right to keep and bear arms for the purpose of self-defense extends outside the home," and reversing the district court's holding that Maryland's "good-and-substantial-reason requirement cannot pass constitutional muster"), *abrogated by Bruen*, 142 S. Ct. 2111. The court reached its decision without "needlessly demarcating the reach of the Second Amendment." *Id.*

47. 712 F.3d 865 (4th Cir. 2013), *abrogated by Bruen*, 142 S. Ct. 2111.

48. *Id.* at 876 ("We hew to a judicious course today, refraining from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections. That is, we merely assume that the *Heller* right exists outside the home and that such right of Appellee Woollard has been infringed.").

49. *Id.* at 880–81 ("We specifically subscribe to the *Kachalsky* court's analysis that New York's proper-cause requirement 'is oriented to the Second Amendment's protections,' and constitutes 'a more moderate approach' to protecting public safety and preventing crime than a wholesale ban on the public carrying of handguns." (quoting *Kachalsky*, 701 F.3d at 98–99)).

50. 724 F.3d 426 (3d Cir. 2013), *abrogated by Bruen*, 142 S. Ct. 2111.

51. *Id.* at 440 (upholding proper cause firearm law).

within the scope of the Second Amendment in order to avoid historical analysis and to decide the case based instead on means-end analysis.[52] Deciding that any supposed Second Amendment right to carry a handgun outside the home for self-defense, if it exists at all, is "not part of the core of the [Second] Amendment," the *Drake* court determined intermediate scrutiny was the appropriate level of scrutiny to apply.[53] Applying intermediate scrutiny, the court found that requiring applicants to demonstrate a "justifiable need" was a reasonable fit with the state's substantial interest in protecting its citizens' safety.[54] The *Drake* court also cited the Second Circuit's decision in *Kachalsky* and the Third Circuit's decision in *Woollard* for support.[55] The court also noted that New Jersey's justifiable need law was in some ways more restrictive than similar laws in other states, but it concluded that New Jersey's law nonetheless withstood intermediate scrutiny as the intermediate scrutiny standard of review does not require the law to be the least restrictive means for achieving the government's objective.[56]

Finally, in *Gould v. Morgan*,[57] the First Circuit upheld a Massachusetts firearm licensing scheme that required handgun-license applicants to demonstrate a "proper purpose" for carrying a gun.[58] The statute left room for municipalities to decide what amounts to proper purpose.[59] Boston and Brookline required applicants to show a specific need for self-defense beyond a "generalized desire to be safe."[60] According to the First Circuit, this proper purpose scheme did not violate the Second Amendment.[61] The *Gould* court, like virtually all courts addressing Second

52. *Id.* at 434 ("[W]e believe that the 'justifiable need' . . . Handgun Permit Law . . . regulates conduct falling outside the scope of the Second Amendment's guarantee."). Nevertheless, the *Drake* court moved on to the second step of the two-step framework and applied means-end scrutiny because "the constitutional issues presented to us in this new era of Second Amendment jurisprudence are of critical importance." *Id.* at 434–35.

53. *Id.* at 436 (rejecting plaintiffs' suggestion to apply strict scrutiny).

54. *Id.* at 437–38 (finding New Jersey "undoubtedly" had a substantial interest and that the only real issue was whether there was a reasonable fit between the interest and the means chosen to achieve it).

55. *Id.* at 438 ("Legislators in other states, including New York [*Kachalsky*] and Maryland [*Woollard*], have reached this same predictive judgment and have enacted similar laws as a means to improve public safety.").

56. *Id.* at 439–40 (concluding the justifiable need standard "withstands intermediate scrutiny and is therefore constitutional").

57. 907 F.3d 659 (1st Cir. 2018), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

58. *Id.* at 663 (explaining Massachusetts' firearms licensing scheme).

59. *See id.* ("Municipalities differ in their requirements for an applicant to establish eligibility based on the [statute].").

60. *Id.* (noting that this requirement—to show a specific need beyond a general need for self-defense—was "the focal point of the plaintiffs' challenge").

61. *Id.* at 662 (holding the regulations do not violate the Second Amendment as they are substantially related to important government interests in promoting public safety and crime prevention).

Amendment challenges, adopted the two-step approach for analyzing Boston and Brookline's regulatory schemes.[62] In step one, the *Gould* court assumed the Boston and Brookline regulations burdened the Second Amendment.[63] In step two, the court decided intermediate scrutiny was appropriate and that the regulations withstood intermediate scrutiny.[64]

III. APPLICATION DENIED: YOUNG LACKED SUFFICIENT NEED FOR HANDGUN

In 2007, Hawaii's legislature enacted Hawaii Revised Statutes section 134-9 (2007), regulating licenses to carry firearms. The licensing scheme's restrictions on licenses to carry handguns—requiring applicants to demonstrate they are an "exceptional case" and have "reason to fear injury"—trace back to a seminal 1933 Hawaii firearms regulation act.[65] In fact, Hawaii's laws limited public carry of weapons long before it was a state.[66]

Under section 134-9, individuals seeking a license to carry a handgun in public must apply to their county's chief of police and demonstrate they are an "exceptional case" and have "reason to fear injury to [their] person or property."[67] The statute requires the chief of police of each county in

62. *Id.* at 668 ("In the decade since *Heller* was decided, courts have adopted a two-step approach for analyzing claims that a statute, ordinance, or regulation infringes the Second Amendment right."). Under the two-step framework, courts first determine whether the challenged law "burdens conduct that falls within the scope of the Second Amendment's guarantee." *Id.* at 668–69. To do so, the court considers history and tradition to see if the regulated conduct "was understood to be within the scope of the right at the time of ratification." *Id.* at 669 (quoting United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)). If the law does not burden conduct within the scope of the Second Amendment, it is constitutional, and no further analysis is required. *Id.* If the law does burden conduct within the scope of the Second Amendment, courts apply an appropriate level of means-end scrutiny. *Id.*

63. *Id.* at 670 ("[H]istorical inquiry does not dictate an answer to the question of whether the Boston and Brookline policies burden conduct falling within the scope of the Second Amendment. . . . In the absence of such guidance, we . . . proceed on the assumption that the . . . policies burden the Second Amendment . . . .").

64. *Id.* at 670–77. The court remarked that the Boston and Brookline policies "fit seamlessly" with Massachusetts' objective of reducing gun violence on public streets. *Id.* at 676.

65. *See* Young v. Hawaii, 992 F.3d 765, 774–75 (9th Cir. 2021) (noting that Hawaii's current licensing scheme is substantially the same as it was under regulations enacted in 1961, which "mirrored" regulations from the 1933 act), *vacated* 142 S. Ct. 2895 (2022). "The 'exceptional case' and 'good reason to fear injury' requirements included in the 1933 [a]ct became staples of Hawai'i's future firearm regulations." *Id.* (quoting Act 26, § 8, 1933–1934 Haw. Sess. Laws Spec. Sess. 35, 39).

66. *Id.* at 773 ("Hawai'i law began limiting public carriage of dangerous weapons, including firearms, more than 150 years ago—nearly fifty years before it became a U.S. territory and more than a century before it became a state.").

67. *See* HAW. REV. STAT. § 134-9(a) (2007) ("In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the

the state to adopt procedures for evaluating license applications.[68] The County of Hawaii adopted county-wide rules for evaluating permit applications under section 134-9, which were more restrictive than the state law.[69] However, the county regulations are only valid to the extent they are authorized by the state law; where Hawaii County's rules exceed section 134-9, "the statute—not the county's regulation—would control."[70] According to a formal opinion from Hawaii's Attorney General interpreting section 134-9, "[a]ll that the statute requires is that the applicant (1) meet the objective qualifications; (2) be of good moral character; (3) demonstrate 'sufficient need'; and (4) present no other reason to be disqualified."[71] To demonstrate "sufficient need," "an applicant must demonstrate more than a 'generalized concern for safety.'"[72]

In 2011, the plaintiff, George Young, applied for licenses to carry a firearm in public, either concealed or unconcealed, citing a general need for "personal security, self-preservation and defense, and protection of personal family members and property."[73] The Hawaii County police chief denied both applications because the police chief determined Young had not shown an "exceptional case[ ] or demonstrated urgency."[74] Young challenged the licensing decision and Hawaii's licensing laws through several claims, including a Second Amendment challenge.[75] The

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chief of police of the appropriate county may grant a license . . . to carry a pistol or revolver . . . . Where the urgency or the need has been sufficiently indicated, the respective chief of police may grant to an applicant of good moral character . . . a license to carry a pistol or revolver . . . unconcealed . . . ."); *Young*, 992 F.3d at 775 ("Hawai'i continues to distinguish between concealed carry and open carry, although it is not clear that the difference is particularly significant.").

68. HAW. REV. STAT. § 134-9(b) (2007) (requiring the chief of police of each county to adopt procedures for evaluating licenses to carry concealed weapons).

69. *Young*, 992 F.3d at 776 (observing that the Hawaii County regulations are more demanding than § 134-9 and apply to a broader class of weapons).

70. *See id.* at 776–77 (citing Ruggles v. Yagong, 353 P.3d 953, 964 (Haw. 2015)) (explaining that Hawaii law only authorizes county ordinances consistent with state law).

71. *Id.* at 776 (quoting State of Haw., Dep't of the Att'y Gen., Opinion Letter No. 18-1: Availability of Unconcealed-Carry Licenses, at 6–7 (Sept. 11, 2018) [hereinafter Opinion Letter No. 18-1]) (describing the Attorney General's letter, which discussed how aspects of the County of Hawaii's local rules were not authorized by state law).

72. *Id.* at 776–77 (quoting Opinion Letter No. 18-1, *supra* note 71, at 8) (defining "sufficient need"). Applicants must show a need to carry a firearm for self-defense "that substantially exceeds the need possessed by ordinary law-abiding citizens." *Id.* at 777 (quoting Opinion Letter No. 18-1 *supra* note 71, at 7).

73. *Id.* at 777 (noting the applications for concealed and unconcealed licenses were separate).

74. *Id.* (alteration in original) (stating Hawaii County police chief denied both applications).

75. *Id.* ("[Young] brought separate counts under the Bill of Attainder Clause, the Contracts Clause, the Second Amendment, the Ninth Amendment, and the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment.").

district court dismissed all claims.[76] Regarding the Second Amendment claim, the district court decided the Hawaii law did not burden Second Amendment rights and that, even if it did, it would withstand intermediate scrutiny.[77] Young appealed and a Ninth Circuit panel reversed the district court decision.[78] The Ninth Circuit granted a rehearing en banc to consider whether the Hawaii law violated the Second Amendment.[79]

IV. FROM LANCE TO BLUNDERBUSS: YE OLDE SECOND AMENDMENT

This Part summarizes the Ninth Circuit's historical analysis of the Second Amendment in *Young*. The court limited its scope of review to a facial challenge of section 134-9 because Young did not brief an as-applied challenge.[80] The *Young* court employed the two-step framework.[81] By deciding the case in the first step, the *Young* court diverged from all other circuits that have addressed this issue.[82] While other circuits have all assumed or decided—without extensive historical analysis—that the Second Amendment protects an individual's right to carry firearms openly in public, the Young court conducted an extensive historical analysis without making any assumptions.[83]

A. *The English Right to Bear Arms*

The *Young* court began by analyzing the English concept of the right to bear arms.[84] The English restricted the right to carry weapons in public

76. *Id.* at 777–78 ("Although the district court dismissed Young's claims on various grounds, the only grounds relevant here relate to his Second Amendment and Due Process claims; his other claims have been abandoned on appeal.").

77. *Id.* at 778 (employing the two-step framework, the district court determined the licensing scheme "did not implicate conduct that is protected by the Second Amendment," and, alternatively, that the scheme withstood intermediate scrutiny).

78. *Id.*

79. *Id.* (citing Young v. Hawaii, 915 F.3d 681 (9th Cir. 2019)) (granting rehearing en banc).

80. *Id.* at 780–81 ("Young challenges HRS § 134-9 exclusively on its face, arguing, for example, that HRS § 134-9's 'exceptional case' requirement renders the statute unconstitutional, [and] that HRS § 134-9 violates the broad right to carry firearms in public . . . .").

81. *Id.* at 783 ("Following *Heller* and *McDonald*, we have created a two-step framework to review Second Amendment challenges. Our two-step test is similar to tests adopted by other circuits.").

82. *See supra* note 24 (discussing the First, Second, Third, and Fourth Circuits' approaches to the Second Amendment two-step analysis).

83. *See id.* at 784–85 ("Our sister circuits have, in large part, avoided extensive historical analysis . . . . We do not think we can avoid the historical record."); *see also id.* at 786–821 (dedicating thirty-five pages of the opinion to a survey of the history of firearm regulations).

84. *Id.* at 786 ("[A]s *Heller* made clear, the Second Amendment did not create a new right; it codified a pre-existing one that we 'inherited from our English ancestors.'" (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008))).

as early as the thirteenth century.[85] In many cases, people were required to obtain the "king's special license" to be armed in public, which the government enforced by punishment.[86] The Statute of Northampton, enacted in 1328, codified these restrictions and prohibited people from "going armed in places people were likely to gather."[87] It is unclear how strictly the English government enforced the Statute of Northampton because there is evidence of only a few indictments under the statute.[88] The *Young* court also highlighted two early English cases involving arms restrictions: *Chune v. Piott*[89] and *Sir John Knight's Case*.[90] In *Chune*, the court decided that "[t]he sheriff could arrest a person carrying arms in public 'notwithstanding he doth not break the peace.'"[91] In *Sir John Knight's Case*, Sir John Knight was charged under the Statute of Northampton for, according to one report, "goeing with a blunderbus in the streets, to the terrifyeing his majesties subjects."[92] He was acquitted, but the *Young* court found it important as an example of one of the few indictments under the Statute of Northampton.[93]

The *Young* court next highlighted English treatises that recognized prohibitions on publicly carrying arms in England.[94] According to one of England's first treatises, "no one, of whatever condition he be, [may] go armed in the said city or in the suburbs, or carry arms, by day or by

85. *Id.* at 786 ("In 1299, Edward I ordered the sheriffs of Salop and Stafford to prohibit any one 'from tourneying, tilting . . . or jousting, or making assemblies, *or otherwise going armed within the realm without the king's special licen[s]e.*'" (alterations in original) (quoting CALENDAR OF THE CLOSE ROLLS, EDWARD I: VOLUME 4, 1296–1302, at 318 (H.C. Maxwell Lyte ed. 1906) [hereinafter CALENDAR OF THE CLOSE ROLLS])).

86. *Id.* at 786–87 (quoting CALENDAR OF THE CLOSE ROLLS, *supra* note 85, at 588) (explaining regulations on public carry in the thirteenth and fourteenth centuries).

87. *Id.* at 787–88 (citing Statute of Northampton, 2 Edw. 3, ch. 3 (England 1328)). The court noted that,"[a]ny doubt as to the scope of government's authority to disarm the people in public was dispelled with Parliament's 1328 enactment of the Statute of Northampton, which effectively codified the firearms restrictions that preceded it." *Id.* at 787.

88. *See id.* at 789 (noting that despite the scant record of indictments, "there is evidence that Edward III and his successors regularly instructed sheriffs to enforce the statute").

89. (1615) 80 Eng. Rep. 1161 (K.B.).

90. (1686) 87 Eng. Rep. 75–76 (K.B.); *Young*, 992 F.3d at 790 ("We have been pointed to two cases that may shed light on the restrictions in the Statute of Northampton.").

91. *Young*, 992 F.3d at 790 (quoting Chune v. Piott (1615) 80 Eng. Rep. 1161 (K.B.)).

92. *Id.* (quoting NARCISSUS LUTTRELL, A BRIEF HISTORICAL RELATION OF STATE AFFAIRS, SEPTEMBER 1678 TO APRIL 1714, at 380 (1857)).

93. *See id.* ("The second [case] is *Sir John Knight's Case*, which is important because it was one of the few prosecutions under the Statute of Northampton for which we have some record, even if there are some disputes about what that record signifies.").

94. *See id.* at 792 (turning from early English cases to treatises).

night."[95] Some treatises argued that publicly carrying arms was only an offense if it caused or was intended to cause terror.[96] Others, including treatises by Sir William Blackstone and Lord Edward Coke, "strongly suggested that carrying arms openly was a status offense and that the law did not require proof of intent or effect."[97]

Finally, before crossing the pond to a discussion of colonial America, the *Young* court discussed the English Bill of Rights.[98] The English Bill of Rights provided "[t]hat the [s]ubjects which are Protestants may have [a]rms for their [d]efence suitable to their [c]onditions and as allowed by [l]aw."[99] According to the *Young* court, this provision was important because it connected the right to bear arms to self-defense while recognizing the government's ability to limit that right; also, it gave the right only to Protestants.[100] Blackstone, discussing the English Bill of Rights, observed that "these rights and liberties [are] our birthright to enjoy . . . unless where the laws of our country have laid them under necessary restraints."[101]

B. *Colonial Restrictions on the Right to Bear Arms in Public*

Some colonies imported English arms regulations like those in the Statute of Northampton based on concerns that the presence of firearms "in the public square" was dangerous.[102] Though some colonies placed restrictions on public carry, others "not only permitted public carry, but mandated it."[103] The *Young* court downplayed these permissive colonies and the various carry mandates, saying their overall effect on the right to

95. *Id.* (quoting JOHN CARPENTER, LIBER ALBUS: THE WHITE BOOK OF THE CITY OF LONDON 335 (Henry Thomas Riley ed., 1862)).

96. *See id.* (discussing whether carrying arms in public violated the Statute of Northampton if it did not cause terror). According to one treatise author, a seventeenth century barrister and jurist, "no wearing of arms is within the meaning of this statute [of Northampton], unless it be accompanied with such circumstances as are apt to terrify the people." *Id.* (alteration in original) (quoting 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 489 (John Curwood ed., 1824)).

97. *Id.* at 792–93 (citing treatises that suggested a violation of the Statute of Northampton did not require proof of public terror as a separate element).

98. *Id.* at 793–94 (discussing how the English right to bear arms changed after the Glorious Revolution with the enactment of the English Bill of Rights in 1689).

99. *Id.* at 793 (alterations in original) (quoting 1 W. & M. ch. 2, § 7, (1689)).

100. *See id.* (discussing the significance of the right to bear arms in the English Bill of Rights).

101. *Id.* at 794 (alterations in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *131).

102. *Id.* ("A number of colonies implemented restrictions on the carrying of arms similar to those found in the Statute of Northampton . . . . The colonists shared the English concern that the mere presence of firearms in the public square presented a danger to the community.").

103. *Id.* at 795 (noting public carry mandates in Virginia, Connecticut, Maryland, South Carolina, Georgia, Massachusetts, and Rhode Island).

bear arms is "unclear."[104] Under the *Young* court's interpretation, mandating the public carrying of arms is a form of regulation the same as prohibiting the public carrying of arms.[105] Thus, any colonial-era history demonstrating an acceptance of public carry can be sidestepped because it "was always subject to conditions prescribed by the legislature."[106] The history thus framed "strongly suggests that colonists brought with them the English acquiescence to firearm limitations outlined in the Statute of Northampton."[107]

C. *Post Second Amendment Restrictions on the Right to Bear Arms*

Following ratification of the Constitution, states continued to restrict the public carrying of arms.[108] The legislatures of states with constitutional provisions protecting the right to bear arms apparently did not find prohibitions on publicly carrying firearms inconsistent with their constitutions.[109] Many state laws were similar to the English Statute of Northampton, and North Carolina virtually adopted the Statute of Northampton, not even removing references to the king.[110] The law provided that "no man . . . go nor ride armed by night nor by day."[111] Hawaii's nineteenth-century firearm restrictions mirrored many of these state laws, punishing "[a]ny person not authorized by law, who shall carry, or be found armed with, any bowie-knife, swordcane, pistol, air-gun, slung-shot or other deadly weapon."[112]

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104. *Id.* at 796 (discussing the import of colonial laws permitting or requiring public carry of arms).

105. *Id.* ("The overall effect that these various carry mandates had on the right to bear arms is unclear, and there is some tension between the various ordinances. What is clear is that the colonies assumed that they had the power to *regulate*—whether through *mandates* or *prohibitions*—the public carrying of arms.").

106. *Id.* (dismissing arguments that this history demonstrates a right to carry arms in public because even where colonies allowed public carry it was always theoretically subject to restrictions at the legislature's will). For a further critical analysis of the Ninth Circuit's rationale, see Part V.

107. *Id.* ("[W]here the colonies did allow public carry—or even mandated it—those laws were tied to the overarching duty to bear arms in defense of the community . . . . At bottom, restrictions on firearms in public were prevalent in colonial law.").

108. *Id.* at 797 (explaining that when the Bill of Rights was adopted it did not apply to the states, so most of the early cases involve "state constitutional analogues to the Second Amendment").

109. *Id.* at 801–02 ("[S]tates broadly agreed that small, concealable weapons, including firearms, could be banned from the public square. . . . [S]tate legislatures evidently did not believe that the restrictions we have discussed here were inconsistent with their state constitutions.").

110. *Id.* at 798 (discussing post-ratification firearm restrictions in the states).

111. *Id.* (quoting 1792 N.C. Laws 60, ch. 3) (describing restrictive state firearm laws). A Massachusetts law punished those who "shall ride or go armed offensively." *Id.* (quoting 1795 Mass. Acts 436, ch. 2).

112. *Id.* at 802 (quoting 1852 Haw. Sess. Laws 19, § 1).

In the early nineteenth century, states began adopting new restrictions on mere firearm possession regardless of any public disturbance.[113] Significantly, a Massachusetts law limited the public carry of pistols to those who had "reasonable cause" to fear an assault or violence.[114] Many states adopted laws similar to Massachusetts's, some copying the Massachusetts statute word-for-word, others making adjustments and exceptions.[115] The Ninth Circuit summarized the state laws from this period, noting that generally the states agreed that small, concealable firearms could be banned from "the public square," and that, despite state constitutional provisions guaranteeing a right to bear arms, state legislatures adopted restrictions on the public carry of firearms.[116] When Hawaii was a U.S. territory, its laws were similar to these early state laws restricting firearm possession.[117]

D. *The Basic Rule*

After reviewing over 700 years of English and American history, the *Young* court concluded that the history of this issue is not uniform.[118] However messy and conflicted the *Young* court found that the "history reveals a strong theme: [the] government has the power to regulate arms in the public square."[119] Following its historical inquiry, the court found that individuals do not have the "general right" to carry arms in public for self-defense.[120] Accordingly, the court held: "There is no right to carry arms openly in public; nor is any such right within the scope of the Second Amendment."[121] Because Young's challenge failed at step one of the two-step framework—the challenged law did not infringe upon a right within the scope of the Second Amendment—the means-end analysis was not

113. *Id.* at 799 (discussing how these new restrictions began with Tennessee and Massachusetts). Tennessee prohibited any carrying of belt or pocket pistols. *Id.*

114. *Id.* (quoting 1836 Mass. Acts 750, ch. 134, § 16) ("In effect, the Massachusetts law provided that such weapons could not be carried in public *unless* the person so armed could show 'reasonable cause.'" (quoting 1836 Mass. Acts 750, ch. 134, § 16)).

115. *Id.* (discussing laws from Wisconsin, Virginia, West Virginia, Pennsylvania, Texas, Arizona, and Idaho).

116. *Id.* at 801–02 (summarizing the court's analysis of historical firearm laws).

117. *Id.* at 802 ("The Territory of Hawai'i's enumerated restrictions on carrying weapons were well within this tradition.").

118. *Id.* at 813 (synthesizing a basic rule from 700 years of English and American legal history).

119. *Id.* ("[T]he overwhelming evidence from the states' constitutions and statutes, the cases, and the commentaries confirms that we have never assumed that individuals have an unfettered right to carry weapons in public spaces.").

120. *Id.* (summarizing its review of the history of public carry laws).

121. *Id.* at 821 (citing Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022)).

necessary and the court concluded that the law did not violate the Second Amendment.[122]

V. SCHRÖDINGER'S HISTORY OF THE SECOND AMENDMENT: RIGHTS BOTH REAL AND ILLUSORY UNTIL OBSERVED

This Part provides a critical analysis of the *Young* court's use of history and tradition to decide Second Amendment cases before applying means-end analysis. Subsection A explains how the ambiguous history of the Second Amendment rarely provides a clear answer to questions about the scope of the Amendment's protections. Subsection B explains how this ambiguity invites judicial policymaking and makes it difficult for judges to decide post-*Heller* Second Amendment cases based on objective criteria. Finally, subsection C argues that to resolve these issues, courts should decide Second Amendment cases by performing means-end analysis as the first step of the two-step framework, proceeding to historical analysis only if the challenged law fails under the appropriate level of scrutiny.

A. *The History of the Second Amendment Is Ambiguous*

The Ninth Circuit's decision that the Second Amendment does not create an individual right to bear arms outside the home for self-defense, and that, therefore, it is not necessary to apply means-end scrutiny to uphold proper cause laws, is meaningfully inconsistent with all other circuits that have addressed this issue.[123] The dissent in *Young* emphasized this point: "This holding is as unprecedented as it is extreme . . . . [W]e now become the first and only court of appeals to hold that public carry falls *entirely* outside the scope of the Amendment's protections."[124] The history and tradition of the Second Amendment cannot provide clear guidance on the issue of proper cause laws if four dissenting judges considering that history could conclude that it strongly suggests the Second Amendment

122. *Id.* at 826 ("Young's challenge to Hawai'i's restrictions fails at step one of our framework and 'may be upheld without further analysis.'" (quoting Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016)).

123. *See Kachalsky*, 701 F.3d at 96 (applying intermediate scrutiny based on historical analysis, though without expressly employing the two-step framework); Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (employing the "two-part" approach, assuming that the good-and-substantial-reason requirement burdens a Second Amendment right, and applying intermediate scrutiny), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022); Drake v. Filko, 724 F.3d 426, 431 (3d Cir. 2013) (employing the two-step framework, assuming that requiring a "justifiable need" to carry a handgun for self-defense burdens a right protected by the Second Amendment, and applying intermediate scrutiny), *abrogated by Bruen*, 142 S. Ct. 2111; Gould v. Morgan, 907 F.3d 659, 670, 672 (1st Cir. 2018) (employing the two-step approach, "proceed[ing] on the assumption that the . . . policies burden the Second Amendment," and applying intermediate scrutiny), *abrogated by Bruen*, 142 S. Ct. 2111.

124. *Young*, 992 F.3d at 829 (O'Scannlain, J., dissenting) (finding the majority's decision contradicts Anglo-American legal history).

creates a general right to carry firearms openly in public—the exact opposite of the history-and-tradition-based conclusion of the majority.[125]

This ambiguity makes it difficult or impossible to resolve most Second Amendment cases based solely on the Amendment's history and tradition and is why the two-step framework is necessary.[126] Although the Supreme Court's decision in *Heller* appears to require some consideration of the Second Amendment's history and tradition, it offers little guidance on how to proceed when that history is unclear with respect to a challenged law.[127] If anything, this means that history is binding only when it provides a reasonably definitive answer, and judges should not "read more into the sources than they contain."[128] While history sometimes provides reasonably clear answers to foundational questions—such as the question presented in *Heller* of whether the Second Amendment protects an individual right to bear arms or only a collective right to maintain a militia—it is often insufficient in the "vast majority" of cases, making means-end analysis necessary.[129]

Further, because most modern Second Amendment cases involve nuanced issues, "[t]here is virtually no relevant constitutional history bearing directly on most of these questions."[130] The crux of this issue, which is perhaps why all other circuits have assumed proper cause laws infringe some Second Amendment right in order to get to means-end analysis, is that "[p]retending to find the answers in history and tradition will encourage either covert judicial policymaking . . . or ill-supported historical stories in defense of results that could honestly and responsibly be justified through normal means-end scrutiny."[131] So, ironically, reliance on history and tradition invites exactly the kind of extra-judicial conduct it is meant to prevent.[132]

The tension created by judges attempting to bootstrap inconsistent history to clear definitions of constitutional rights is apparent in *Young*, where the majority admitted to inconsistencies in the history and tradition

125. *See id.* at 832 ("[T]he history of the Second Amendment confirms what the text so strongly suggests: that the Amendment encompasses a general right to carry firearms openly in public.").

126. *See* Nelson Lund, *The Proper Role of History and Tradition in Second Amendment Jurisprudence*, 30 U. FLA. J.L. & PUB. POL'Y 171, 174 (2020) (arguing judges should consider the history of the Second Amendment as one factor in a means-end analysis).

127. *Id.* at 188–89, 195 (explaining the importance of the meaning of the Second Amendment to those who enacted it following *Heller*).

128. *Id.* at 189 (describing the Seventh Circuit's analytical framework for Second Amendment issues).

129. *Id.* at 195 (discussing when textual and historical analysis are sufficient to resolve Second Amendment issues).

130. *Id.* at 195–96 (explaining that most cases will involve "questions about the manner in which government may restrict the freedom to keep or bear arms in the interest of promoting public safety").

131. *See id.* at 196.

132. *See id.*

of firearm regulations that cut against its conclusion.[133] Both the majority and dissenting opinions in *Young* agree that the history and tradition of the Second Amendment is consistent (inconsistencies aside).[134] They disagree only on what it is consistent about—what one side presents as evidence of a consistent historical understanding, the other side dismisses as mere picayune inconsistencies.[135]

The D.C. Circuit, after considering the history and tradition of the Second Amendment, decided that the right of responsible citizens to carry firearms in public is a core right of the Amendment.[136] In their briefs, the parties and amici curiae in Moore "treated [the Seventh Circuit] to hundreds of pages of argument" focused on the history of the Second Amendment.[137] Although the *Moore* court was "disinclined" to conduct extensive historical analysis of the Second Amendment, in one part of its analysis it cited to the same seventeenth century English cases that the Ninth Circuit cited in *Young*.[138] The *Moore* court used the case to *support* a Second Amendment right to public carry, while the Ninth Circuit used the same case to show a *lack of support* for a right to public carry.[139]

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133. Young v. Hawaii, 992 F.3d 765, 821 (9th Cir. 2021) ("We have recognized that the materials do not always agree . . . ."), *vacated* 142 S. Ct. 2895 (2022).

134. *Compare id.* at 820–21 (finding the history of the Second Amendment *does not* support a right to carry a firearm outside the home for self-defense, despite certain longstanding exceptions), *with id.* at 831–32 (O'Scannlain, J., dissenting) (finding the history of the Second Amendment *does* support a right to carry a firearm outside the home for self-defense, despite some historical public carry firearms regulations).

135. *See id.* at 831 (O'Scannlain, J., dissenting) ("Under appropriate inspection, the critical sources on the meaning of the Second Amendment—its text, its historical interpretations . . . and its treatment by early legislatures—unequivocally demonstrate that the Amendment does indeed protect the right to carry a gun outside the home for self-defense . . . .").

136. See Wrenn v. District of Columbia, 864 F.3d 650, 667 (D.C. Cir. 2017) (finding that the right of "responsible citizens to carry firearms for personal self-defense beyond the home" lies at the core of the Second Amendment and that D.C.'s good-reason law was "necessarily a total ban on exercises of that constitutional right for most D.C. residents").

137. Moore v. Madigan, 702 F.3d 933, 935 (7th Cir. 2012) (observing that both sides of the case stacked the history of the Second Amendment to support its argument for or against the Illinois law restricting public carry), *reh'g denied*, 708 F.3d 901.

138. *Id.* at 936, 942.

139. *Compare id.* at 936 (explaining that *Sir John Knight's Case* interpreted the Statute of Northampton as punishing "people who go armed to terrify the King's subjects," emphasizing that some weapons do not terrify the public, so the statute must only have applied to the public carry of *some types* of weapons), *with Young*, 992 F.3d at 790–91 (observing that, in *Sir John Knight's Case*, the Chief Justice of the King's Bench opined that the Statute of Northampton was "to punish those who go armed," and that publicly carrying arms was "an affront to the king's peace because the act of carrying arms in public suggested that 'the King [was] not able or willing to protect his subjects'" (alteration in original) (quoting *Sir John Knight's Case*, 87 Eng. Rep. 75, 330 (K.B.))).

B. *How Judges May Use Ambiguity to Affect Policy*

These inconsistent conclusions, ostensibly based on history, support the notion that varying approaches to historical analysis can drastically affect the outcome of cases and allow judges to make policy decisions while appearing to apply objective criteria.[140] For instance, courts need to determine how long a law must have existed to be considered "longstanding."[141] In many cases, a law's status as longstanding determines whether a challenged regulation is consistent with the Second Amendment.[142] The *Heller* Court decided that a law does not necessarily have to antedate ratification of the Second Amendment to be considered longstanding, but otherwise left the question open.[143]

Circuit courts and judges have split over the issue of the requisite time for a law to be longstanding.[144] Many modern firearm regulations are rooted in laws enacted at the beginning of the twentieth century—a period of rapid growth in the administrative state and a time when firearm technology was developing to a point where "it made sense to regulate different kinds of firearms."[145] Perhaps unsurprisingly, it is this roughly thirty-year period in the beginning of the twentieth century that divides the courts, with upholding courts saying these laws should be considered, and invalidating courts saying these laws are too recent to be considered.[146] Additionally, judges conducting a historical analysis must attempt

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140. *See* Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the Outcome of Post-*Heller *Second Amendment Cases*, 29 WM. & MARY BILL RTS. J. 413, 413 (2020) ("[H]ow courts have addressed what historical period to look to, how prevalent a historical tradition must be, and whether to address history at a high or low level of generality—can drastically affect the outcome of cases.").

141. *Id.* at 427 (describing step one of the two-step framework courts have adopted for resolving Second Amendment challenges). Whether a law is "longstanding" is significant because the Supreme Court in *Heller* said:

> "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Id. (alteration in original) (quoting District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008)).

142. *Id.* (explaining that the measure of "longstanding" is often determinative as to whether a gun regulation violates the Second Amendment).

143. *Id.* at 428 (pointing to the *Heller* Court's consideration of "[p]ostenactment legislative history" (quoting *Heller*, 554 U.S. at 605)).

144. *Id.* ("While often not explicit about the answer, courts have generally split across two conclusions: setting the cutoff at either the tail end of the nineteenth century or the first third of the twentieth century.").

145. *Id.* at 427–28 (summarizing the development of firearms regulations throughout the nineteenth and twentieth century).

146. *See id.* at 428–31 (summarizing the different circuit court decisions on what amounts to "longstanding").

to reconcile regional inconsistencies and decide how prevalent a regulatory tradition must have been to affect its analysis.[147]

Deciding Second Amendment challenges based on the Amendment's historical understanding invites judicial lawmaking and creates precedent that is difficult to apply in future cases.[148] Analyzing the historical understanding of the Second Amendment to decide Second Amendment challenges will often turn on what sources are considered and at what level of generality the survey is conducted, rather than any objective evidence.[149] In this context, "judicial policymaking is especially invidious because it is hidden behind the veneer of neutral methodological decisions."[150]

Nowhere is judicial policymaking more invidious or better "hidden behind the veneer of neutral methodological decisions" than in Second Amendment cases "where the body of historical regulation, case law, and scholarly and popular commentary is so large and spread over such a broad period of time that radically different conclusions can be reached based on barely visible changes in methodology."[151] The irony of this proposition is that the originalist framework rooted in textual and historical analysis is meant to guard against such judicial overreach.[152] In Justice Scalia's *McDonald* concurrence, he defended originalist methodology by saying it is "beyond all serious dispute that [originalist methodology] is much less subjective . . . because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor."[153]

C. *A Simple Solution Already Adopted by Many Circuits*

Courts should "hew to a judicious course" by assuming in marginal cases that challenged laws burden conduct protected by the Second Amendment as historically understood and proceed to apply means-end

147. *Id.* at 431–36 (discussing issues of prevalence and regional variation).

148. *See* Lund, *supra* note 126, at 196 (arguing that decisions based on historical analysis invite judicial policymaking).

149. *See* Frassetto, *supra* note 140, at 452–53 (arguing that deciding Second Amendment cases based solely on history and tradition, "even if the history is examined in an evenhanded manner, retains enormous opportunity for a judge's 'ethico-political First Principles' to influence the result of a case" (quoting McDonald v. City of Chicago, 561 U.S. 742, 804 (2010))). Frassetto concludes that "[g]uns have been regulated throughout American history, and gun laws have always evolved to meet changing public needs. The courts should not end that tradition by applying an excessively restrictive form of originalism." *Id.* at 453 (footnotes omitted).

150. *Id.*

151. *Id.* (arguing that the problems with historical analysis are emphasized in Second Amendment cases).

152. *See id.* at 452 (defending originalist methodology when applied correctly).

153. *Id.* (quoting McDonald v. City of Chicago, 561 U.S. 742, 804 (2010) (Scalia, J., concurring)).

analysis.[154] If a law burdening conduct protected by the Second Amendment withstands means-end analysis based on the proper level of scrutiny, it withstands a constitutional challenge regardless of whether the right can be found in the history and text of the amendment.[155] Importantly, consistent with *Heller*, this would not completely eliminate the role of historical analysis in Second Amendment cases.[156] In cases where the challenged law fails means-end analysis based on an appropriate level of scrutiny, it would be necessary to fully analyze the history and text of the Second Amendment to determine if the law burdens a right protected by the Amendment.[157]

Historical analysis cannot, and should not, be eliminated entirely. Rather, making historical analysis the *second* step of the two-step framework, and making means-end analysis the first, discourages "covert judicial policymaking," in all cases but those involving the most heavy-handed firearm regulations.[158] To determine the appropriate level of scrutiny for the means-end analysis, courts need only determine if the challenged law burdens the "core" right of the Second Amendment.[159] This determination does not require historical analysis as the Supreme Court already defined the "core" of the Second Amendment in *Heller*.[160]

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154. *See* Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (explaining the court would "hew to a judicious course" by assuming the Second Amendment created a right to carry firearms for self-dense outside the home and proceeding to apply intermediate scrutiny), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022); *see also* Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 93, 96 (2d Cir. 2012) (assuming proper cause law burdens the Second Amendment and applying intermediate scrutiny), *abrogated by Bruen*, 142 S. Ct. 2111; Drake v. Filko, 724 F.3d 426, 430–31 (3d Cir. 2013) (same), *abrogated by Bruen*, 142 S. Ct. 2111; Gould v. Morgan, 907 F.3d 659, 670, 672 (1st Cir. 2018) (same), *abrogated by Bruen*, 142. S. Ct. 2111.

155. *See Woollard*, 712 F.3d at 876 (explaining that the court is free to assume a law burdens the Second Amendment if it "passes constitutional muster under . . . the applicable standard" of scrutiny).

156. *Cf. id.* (implying that the court would not be free to assume the challenged law burdened a Second Amendment right if it failed under the applicable standard of scrutiny).

157. *Cf. id.* (implying historical analysis is required where laws fail means-end analysis).

158. *Cf. id.* (explaining that historical analysis is required only if challenged law fails means-end analysis); *cf.* Lund, *supra* note 126, at 196 (determining whether certain conduct is protected by the Second Amendment is unnecessary if the law regulating that conduct passes means-end analysis, thus avoiding "covert judicial policymaking").

159. *See, e.g.*, *Woollard*, 712 F.3d at 876 (explaining that laws burdening the core of the Second Amendment are subject to strict scrutiny but that laws otherwise burdening a Second Amendment right are subject to intermediate scrutiny).

160. *See* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (holding that the "core protection" of the Second Amendment is the right of law-abiding, responsible citizens to possess firearms for self-defense of the home); *Woollard*, 712 F.3d at 876 (noting the difference between core and non-core Second Amendment rights); Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 93 (2d Cir. 2012) (same), *abrogated by* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111

The Ninth Circuit could have reached the same result in *Young* using means-end analysis because proper cause requirements for public carry permits can withstand any level of means-end scrutiny.[161] Every circuit court that applied means-end analysis to proper cause laws decided the laws withstood intermediate scrutiny.[162] Though no court has applied strict scrutiny to proper cause laws, there is a strong argument that they would withstand the compelling interest and narrowly tailored requirements.[163] Based on the foregoing, the Ninth Circuit should have assumed Hawaii's proper cause law restricted a Second Amendment right and upheld the law by finding it withstood either intermediate or even strict scrutiny.

VI. FAR FROM A MOOT POINT

The Supreme Court recently decided proper cause laws, like the law at issue in *Young*, violate the Second Amendment in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*.[164] In *Bruen*, plaintiffs brought a test case to challenge New York's proper cause law.[165] The Supreme Court's decision rehashed the historical analysis conducted by the Ninth Circuit in *Young* and will likely disrupt the "Second Amendment Federalism" developed in the

(2022); Drake v. Filko, 724 F.3d 426, 436 (3d Cir. 2013) (same), *abrogated by Bruen*, 142 S. Ct. 2111; Gould v. Morgan, 907 F.3d 659, 670–71 (1st Cir. 2018) (same), *abrogated by Bruen*, 142 S. Ct. 2111. *But see* Wrenn v. District of Columbia, 864 F.3d 650, 666 (D.C. Cir. 2017) (deciding that the core of the Second Amendment extends beyond the right to possess firearms for self-defense of the home and that, under *Heller*, laws burdening the core of the Second Amendment are per se unconstitutional).

161. Tisoky, *supra* note 11, at 588 (arguing special need laws are narrowly tailored to further a compelling government interest, the requirement under strict scrutiny).

162. *See Woollard*, 712 F.3d at 880; *Kachalsky*, 701 F.3d at 98; *Drake*, 724 F.3d at 440; *Gould*, 907 F.3d at 676.

163. Tisoky, *supra* note 11, at 586–88 ("The governmental interest of protecting public safety and preventing crime . . . is indisputably compelling. . . . [Proper cause laws] appear narrowly tailored, as those who can satisfy the [proper cause] requirement are those most likely to exercise the right to self-defense.").

164. 142 S. Ct. 2111, 2156 (2022) (holding New York's proper cause law violates the Second Amendment—incorporated through the Fourteenth Amendment—because the Second Amendment protects the right of law-abiding citizens to bear arms for ordinary self-defense). Consequently, the Supreme Court vacated the Ninth Circuit's decision and remanded the case for reconsideration under *Bruen*. Young v. Hawaii, 142 S. Ct. 2895 (2022).

165. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Beach, 354 F. Supp. 3d 143, 145 (N.D.N.Y. 2018) (explaining that licensing officers denied plaintiffs' applications pursuant to New York's proper cause law and upholding the law under Second Circuit precedent). The plaintiffs in *Beach* acknowledged that *Kachalsky* controlled their case. *Id.* at 148–49. Recall that in *Kachalsky*, the Second Circuit upheld New York's proper cause law against a Second Amendment challenge. *See supra* notes 38–45 and accompanying text. On appeal, the Second Circuit affirmed the trial court's decision in a summary order. N.Y. State Rifle & Pistol Ass'n, Inc. v. Beach, 818 F. App'x 99, 100 (2d Cir. 2020) ("Appellants' argument that *Kachalsky* was wrongly decided fails under this [c]ourt's precedents.").

decade following the *Heller* decision.[166] Although the term "Second Amendment Federalism" seems like an oxymoron—it is federal constitutional law, supreme and immune from regional variation—the Supreme Court's decision in *Heller* grounded the individual Second Amendment right to bear arms in self-defense, and states define the scope of self-defense.[167] Further, before *Bruen*, the Supreme Court denied certiorari in every case involving Second Amendment challenges to proper cause laws following *Heller* and *McDonald*.[168] It is perhaps no coincidence that *Bruen* was the first time the Court had an opportunity to consider the constitutionality of proper cause laws with a 6–3 balance of Republican vs. Democrat appointees.[169] In striking down New York's proper cause law, the Court also struck down the two-step framework for Second Amendment challenges.[170] Under *Bruen*, the government has the burden to prove a challenged firearm regulation is consistent with the history and tradition of the Second Amendment; there is no place for means-end scrutiny.[171]

Though *Bruen* overrules *Young* and does away with the two-step framework, this Note's critical analysis of the *Young* court's history-and-tradition approach applies the same to the *Bruen* decision. If anything, *Bruen* further highlights how the history and tradition of the Second Amendment, as long and winding as it is, can be cherry-picked to support whatever outcome the judge-historian desires.[172]

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166. *See Bruen*, 142 S. Ct. at 2135–36, 2149 (categorizing historical sources "because, when it comes to interpreting the Constitution, not all history is created equal," and stating that the Ninth Circuit's holding "has little support in the historical record"); Brian Erickson, *Second Amendment Federalism*, 73 STAN. L. REV. 727, 727 (2021) (explaining that over time federal courts have allowed state legislatures to define self-defense firearm rights and arguing that courts should "recognize self-defense law as a site of iterative policy development, and treat laws regulating the instrumentalities of self-defense (for example, firearms) with a degree of deference" in what the author terms "Second Amendment Federalism").

167. *See* Erickson, *supra* note 166, at 758 (explaining that Second Amendment Federalism is based on how courts and legislatures define the scope of the right to self-defense); District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (holding that the Second Amendment protects an individual right to possess firearms in the home for self-defense).

168. Gould v. Lipson, 141 S. Ct. 108 (2020) (denying certiorari); Drake v. Jerejian, 572 U.S. 1100 (2014) (denying certiorari); Kachalsky v. Cacace, 569 U.S. 918 (2013) (denying certiorari); Woollard v. Gallagher, 571 U.S. 952 (2013) (denying certiorari); Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017) (denying rehearing en banc; no petition for certiorari filed); Moore v. Madigan, 708 F.3d 901 (7th Cir. 2013) (denying rehearing en banc; no petition for certiorari filed).

169. *See Members of the Supreme Court of the United States*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/Z8HP-BM8Q] (last visited Oct. 17, 2022) (providing a list of present members of the U.S. Supreme Court).

170. *See Bruen*, 142 S. Ct. at 2127 ("Despite the popularity of this two-step approach, it is one step too many.").

171. *See id.*

172. *See* Saul Cornell, *Cherry-Picked History and Ideology-Driven Outcomes:* Bruen*'s Originalist Distortions*, SCOTUSBLOG (Jun. 27, 2022, 5:05 PM), https://

The Supreme Court's decision further restricts states from enacting gun control laws and will likely affect the health and safety of thousands of Americans.[173] Before *Bruen*, Second Amendment litigation could generally be divided into the pre-*Heller* period—where the Court virtually never entertained challenges to states' ability to enact gun law—and the post-*Heller* period—where the Court upheld the right of citizens to have a gun in the home for self-defense.[174] By expanding *Heller* and striking down proper cause laws, the Supreme Court moved Second Amendment jurisprudence into a new era where judges may seemingly strike down almost any gun law.[175] At bottom, using history and tradition as a veneer on policy decisions to expand and contract constitutional rights erodes the separation of powers. When it comes to the Second Amendment, these decisions have life or death consequences.[176]

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www.scotusblog.com/2022/06/cherry-picked-history-and-ideology-driven-outcomes-bruens-originalist-distortions/ [https://perma.cc/29W4-B58E] (arguing that the court's selective historical analysis in *Bruen* presented "a version of the past that is little more than an ideological fantasy").

173. *See* Jonathan E. Lowry, Christa Nicols & Kelly Sampson, *Everything's at Stake: Preserving Authority to Prevent Gun Violence in the Second Amendment's Third Chapter*, 106 MINN. L. REV. HEADNOTES 118, 120 (2021) (presenting various studies showing that weaker gun laws are correlated with higher homicide and firearm homicide rates).

174. *Id.* at 118–19 (discussing the history of Second Amendment litigation).

175. *See id.* at 118–19 (predicting a "third chapter" in Second Amendment litigation).

176. *See id.* 119–21 (arguing that changes in gun laws have "life and death consequences" and that expanding *Heller* "would put the United States into uncharted waters, because Americans have always decided gun policy through democratic processes, not judges").